Supreme Court, U.S.
FILED
OCT 2 2003
OFFICE OF THE CLERK

No. 03-331

In The
Supreme Court of the United States

EIE GUAM CORPORATION,

Petitioner,

v.

THE LONG-TERM CREDIT BANK OF JAPAN, LTD., and THE RESOLUTION AND COLLECTION CORPORATION

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act (FSIA) grants federal courts subject matter jurisdiction over, and authorizes removal of, actions against a "foreign state." 28 U.S.C. §§ 1330(a) and 1441(d). A foreign state is defined to include "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). The FSIA's express terms provide that an agency or instrumentality includes a corporation if it is an organ of a foreign state, regardless of its ownership. Specifically, the FSIA defines an "agency or instrumentality of a foreign state" as, *inter alia*, any entity "(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state . . . , ***or*** a majority of whose shares or other ownership interest is owned by a foreign state . . . , and (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country." 28 U.S.C. § 1603(b) (emphasis added).

The questions presented are:

1. Whether, notwithstanding the use of the disjunctive "or" in the FSIA, a corporate entity which is an organ under the first prong of 28 U.S.C. § 1603(b)(2), must also satisfy the separate, alternative "ownership" prong of 28 U.S.C. § 1603(b)(2), the alternative addressed in *Dole Food Co. v. Patrickson*, 538 U.S. ___, 155 L. Ed. 2d 643, 123 S. Ct. 1655 (2003), to be an agency or instrumentality of a foreign state.

2. Whether the FSIA's express language authorizing removal of "any civil action brought in a State court against a foreign state," 28 U.S.C. § 1441(d), should be limited to exclude removal by a foreign sovereign which joins as a defendant pursuant to stipulation and court order.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent The Resolution and Collection Corporation (RCC) is a corporate entity organized under the laws of Japan, and is an organ of the government of Japan. The RCC is 100% owned by The Deposit Insurance Corporation of Japan, an agency and instrumentality of the Japanese government.[1] Respondent Shinsei Bank, Ltd., formerly known as The Long-Term Credit Bank of Japan, Ltd. (Bank), is a Japanese corporation and has no parent corporation. The only shareholder that holds more than 10% of the Bank's common stock is New LTCB Partners C.V.

[1] Because the RCC is an organ of the Japanese government, this information is merely submitted for the Court's convenience.

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STATEMENT OF THE CASE

A. Statutory Framework

The Foreign Sovereign Immunities Act of 1976 (FSIA) establishes comprehensive statutory standards for actions against a foreign state or its agencies and instrumentalities. H.R. Rep. No. 94-1487, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610; *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). It "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States." H.R. Rep. No. 94-1487, at 12. The FSIA "preempt[s] any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities." *Id.* The FSIA governs "when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States." *Id.* at 6.

The FSIA must be applied by the courts in every action against a foreign state. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). The FSIA defines a "foreign state" to include "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). Section 1603(b) defines "[a]n agency or instrumentality of a foreign state" as meaning "any entity – "

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, ***or*** a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

> (3) which is neither a citizen of a State of the United States as defined in Section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b)(1), (2) and (3) (emphasis added).

Petitioner EIE Guam Corporation (EIEG) here in effect contends that "or" means "and." In *Dole Food Co. v. Patrickson*, 538 U.S. __, 155 L. Ed. 2d 643, 123 S. Ct. 1655 (2003), this Court considered only one of the two alternative prongs of Section 1603(b)(2). In particular, *Patrickson* addressed the second prong of Section 1603(b)(2), namely, whether "a corporation is an 'agency or instrumentality' if a foreign state owns a majority of the shares of a corporate enterprise that in turn owns a majority of the shares of the corporation." *Dole Food Co. v. Patrickson*, 536 U.S. 956 (2002). The first prong of Section 1603(b)(2) – whether the removing party is an "organ of a foreign state or political subdivision thereof" – was ***not*** before this Court nor was it addressed.[2]

Under the FSIA, an agency or instrumentality of a foreign state which is a defendant in "any action brought in a State court" may remove the action to federal court. 28 U.S.C. § 1441(d). "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts. . . . " *Verlinden*, 461 U.S. at 497. The House Report for the FSIA emphasizes: "In view of the potential sensitivity of actions against

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[2] Various briefs in *Patrickson* stressed that the separate "organ" prong was not at issue. *E.g.*, Brief of the United States (May 31, 2002) at 12 n.5; *see infra* at 16-17.

foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts." H.R. Rep. No. 94-1487, at 32. In light of the unusually strong preference "that actions involving foreign states be tried in federal courts," the customary limitations on removal in diversity cases – such as timing, amount in controversy, and joinder of parties – are inapplicable in FSIA cases. *Id.*; *see* 28 U.S.C. § 1441(d).

B. Factual and Procedural Background

This appeal arises from an interlocutory order.[3] On February 6, 2001, the parties signed a Term Sheet for Settlement, but the settlement did not close by the August 9, 2001 deadline. The Ninth Circuit held that material breaches of the Term Sheet precluded specific performance of the settlement. The court required a return to trial, remanding the case to the district court. Thus, although this action was filed in 1995, no trial has occurred and no judgment has been entered.

1. This action is factually and procedurally complex. EIEG owes The Long-Term Credit Bank of Japan, Ltd. (the Bank)[4] hundreds of millions of dollars in connection with the development and construction of a hotel on Guam. On August 2, 1995, EIEG sued the Bank in Guam

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[3] Indeed, it is EIEG's second petition for certiorari prior to trial. *See EIE Guam Corp. v. Supreme Court of Guam*, 191 F.3d 1123 (9th Cir. 1999), *cert. denied*, 528 U.S. 1137 (2000).

[4] The Bank has changed its name to Shinsei Bank, Ltd.

Superior Court to avoid its debt, alleging a variety of common law theories. The Bank filed counterclaims seeking to recover the money owed by EIEG.

Written financing documents reflect the hundreds of millions of dollars EIEG owes to the Bank. These documents include a July 1992 written construction loan agreement executed by EIEG, pursuant to which the Bank directly loaned $100.3 million to EIEG for the construction of the hotel, and three July 1992 guaranties executed by EIEG pursuant to which EIEG guaranteed certain debt owed by EIEG's then corporate parent, EIE International Corporation (EIEI), to the Bank. (ER 635-36, ER 1076, SER 12, SER 15.) These guaranties acknowledged that the Bank previously lent funds to EIEI which EIEI advanced to EIEG for the hotel. (ER 322, ER 373, ER 422, ER 837-38, SER 13.) EIEG's records confirm that the Bank lent most of the money to construct the hotel. (ER 730, SER 247, SER 250-51.)

In July 1994, EIEG defaulted and asked the Bank to forbear on exercising its remedies while EIEG and EIEI tried to sell the hotel. The Bank, EIEG, and EIEI then entered into a Forbearance Agreement wherein EIEG confirmed the validity of the financing documents and generally released all claims against the Bank. (SER 17-19, ER 1670-89.)

In 1995, notwithstanding EIEG's general release in the Forbearance Agreement and after EIEG failed to sell the hotel, EIEG filed this lawsuit against the Bank and other lenders. (ER 11-13.) As the district court recognized, "[d]espite EIEG's judicial admission and the Guam Superior Court's finding that EIEG received at least $170 million in loan funds, EIEG has not made any interest or

other payments to the Bank or the RCC since 1995." (ER 1707.)

2. On October 16, 1998, in response to extreme financial difficulties experienced by a number of Japanese financial institutions including the Bank, the Japanese Diet enacted "*Kinyu Kinou no Saisei no tameno Kinkyu Sochi ni kansuru Houritsu*" (in English, "The Law Concerning Emergency Measures for the Reconstruction of the Function of the Financial System") (Financial Reconstruction Law). The purpose of this law is to stabilize and revitalize the ailing Japanese financial system and provide emergency measures against the problems arising out of the collapse of financial institutions. Financial Reconstruction Law, Art. 1. This law authorizes the Financial Reconstruction Commission (FRC), an agency or instrumentality of the Japanese government (SER 187), to place a failed bank under "Special Public Management" (*tokubetsu kouteki kanri)*. The Financial Reconstruction Law empowers the Deposit Insurance Corporation of Japan (DICJ) – a Japanese government agency analogous to the Federal Deposit Insurance Corporation in the United States[5] – to purchase non-performing assets from banks under Special Public Management. In October 1998, the Bank became a bank under Special Public Management pursuant to the Financial Reconstruction Law. At the same time, the DICJ acquired all of the issued shares of stock of LTCB. (ER 821.)

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[5] The district court found that EIEG did not dispute that the DICJ "is an 'agency or instrumentality' of the Japanese government." (ER 999.) EIEG did not challenge this finding on appeal.

3. On April 1, 1999, the Japanese government created the RCC, as a wholly-owned subsidiary of the DICJ, to carry out Japanese national policy relating to revitalization of the Japanese financial system. *Tokutei Jutaku Kinyu Senmon Kaisha no Saiken Saimu no Shori no Sokushin tou ni kansuru Tokubetsu Sochi Hou* (Jusen Law), Art. 3.1; Supplementary Provisions of *Yokin Hoken Hou* (Deposit Insurance Law), Art. 7.1. The RCC is an agency or instrumentality of the Japanese government analogous to the Resolution Trust Corporation (RTC) in the United States. (ER 821-22.) Just as the RTC acquired non-performing loans from failed financial institutions in the United States and collected or otherwise disposed of such loans, the RCC performs a similar function in Japan. Paragraph 2 of Article 53.1 of the Financial Reconstruction Law authorized the DICJ to entrust purchases of non-performing loans to the RCC. (ER 820-822.)

After the Japanese government nationalized the Bank and created the RCC, the Bank transferred the loans, mortgages, and other financing agreements and security at issue in this case (along with many other non-performing loans) to the RCC pursuant to the Japanese Financial Reconstruction Law (Article 72) and the Deposit Insurance Law (Article 64) and its Supplementary Provisions (Article 10.1). (SER 186.) The DICJ determined the terms and conditions of the asset purchase agreement under the supervision of the Financial Reconstruction Commission. (SER 187.) The Ninth Circuit recognized the RCC's unique charter: "[T]he RCC took on that interest pursuant to the policies of the government of Japan, and any obligations arising from a judgment in EIEG's favor would be borne by the government and taxpayers of Japan." 322 F.3d at 646.

4. On March 3, 2000, with notice that the RCC was an agency or instrumentality of the Japanese government (ER 820-822, ER 826),[6] the parties stipulated to joinder of the RCC as a defendant and counterclaimant. (ER 901-06.) Not only did EIEG stipulate that the RCC join as a defendant (ER 902), but it also repeatedly argued that the preliminary injunction issued by the Guam Superior Court on June 14, 1999 enjoined the RCC from foreclosing on the mortgages on the hotel (SER 394), asserted that the RCC's claim for recovery was subject to set off of EIEG's claims against the Bank (ER 831 n.4), and argued that EIEG's declaratory relief claim directly related to the RCC's rights. Thus, upon the RCC's joinder, this became an action against a foreign state.

5. Immediately upon its joinder as a defendant, the RCC removed this action to federal court pursuant to the FSIA. (ER 901-06.) At the time the RCC was joined – and at the time of removal – the RCC was (and still is) an agency or instrumentality of the Japanese government.

6. EIEG moved to remand. The district court denied EIEG's motion, finding that the RCC is an organ of the Japanese government and a defendant against whom EIEG asserts claims.

7. On February 6, 2001, the parties executed a Term Sheet, which contemplated a settlement closing no later than August 9, 2001. Under the contemplated settlement, EIEG would pay the RCC $55 million and the parties were to exchange executed releases, dismissals, and other

[6] The Bank's joinder motion plainly stated that the RCC was an agency or instrumentality of the Japanese government. *Id.*

settlement documents. When the settlement failed to close by the August 9, 2001 deadline, the RCC/Bank sought an immediate return to trial as provided by the Term Sheet. EIEG filed a motion seeking to reform the Term Sheet, including a request that EIEG be given more time to pay the $55 million to the RCC. On May 13, 2002, the district court granted in part EIEG's motion, giving EIEG until November 25, 2002 to pay the settlement amount and interest.

8. EIEG appealed, and the RCC/Bank cross-appealed. The Ninth Circuit reversed the modification to, and enforcement of, the settlement, holding that mutual breaches had occurred rendering the settlement unenforceable. The Ninth Circuit remanded the case for trial.

9. The Ninth Circuit rejected EIEG's contentions on removal and jurisdiction. Specifically:

a. The RCC is not an "ordinary private business corporation" as EIEG asserts. It is an organ of the Japanese government. As the Ninth Circuit recognized, "the RCC's purpose 'is to carry out Japanese national policy related to the revitalization of the Japanese financial system'. . . . " 322 F.3d at 641. The Ninth Circuit specifically held that "[i]n view of the circumstances of its founding; its funding and financial connection to the government and taxpayers of Japan; its mission; and its purpose, . . . the RCC is an organ of the Japanese government. It is therefore a 'foreign state' within the meaning of the FSIA and is entitled to exercise the rights afforded foreign states under the FSIA." *Id.* at 642. As the Ninth Circuit concluded, "[t]he Japanese gover ıment created the RCC expressly to perform a public function." *Id.* at 640.

The Ninth Circuit based its decision on the district court's findings of fact, which the Ninth Circuit held were

"all supported in the record." *Id.* at 640-41. Specifically, the Ninth Circuit recognized:

- "[T]he RCC was created pursuant to several laws enacted by the Japanese Diet, namely Article 3.1 of *Tokeutei Jutaku Kinyu Senmon Kaisha no Saiken Saimu no Shori no Sokushin tou ni kansuru Tokubetsu Sochi Hou,* and supplementary provisions of *Yokin Hoken Hou*. . . ."

- "'[[T]]he Japanese government created the RCC to carry out Japanese national policy related to revitalization of the Japanese financial system.'"

- "'[[O]]ne of the primary functions of the RCC is to purchase, administer, collect and dispose of non-performing loans purchased from failed financial institutions, such as [the Bank], at the request of the Deposit Insurance Corporation of Japan, ('DICJ'), in accordance with Japanese Law.'"

- "[M]any of the RCC's activities are performed exclusively by the RCC and the DICJ [Deposit Insurance Corporation of Japan] and '[o]ther companies are not permitted to perform such activities even if they are in the loan collection business.'"

- "'[[T]]he RCC is funded by the Japanese government. . . .'"

- "'Japanese law provides that the [government-owned] DICJ will compensate the RCC for all losses at the end of every fiscal year.'"

- "'[T]he financial impact of any failure to collect the [EIEG] loans and guarantees assigned by [the Bank] to the RCC, or of a monetary damage award . . . in favor

[of] EIE Guam against the RCC, will ultimately be borne by the Japanese government and the Japanese taxpayers.'"

322 F.3d at 640. EIEG does not seek this Court's review of the lower court's determination that the RCC is an organ of the Japanese government under the FSIA.

b. Removal was proper. EIEG asserted claims against the RCC. As the district court found, the RCC did not voluntarily interject itself into an action that otherwise would not be binding on it. As the Bank's transferee, the RCC would be bound by the judgment in the action regardless of whether it is formally joined as a defendant. Fed. R. Civ. P. 25(c); Guam R. Civ. P. 25(c). Joinder therefore merely allowed the RCC to defend its interests in the action in its own name and to assert its rights, including the right to remove the action to federal court pursuant to 28 U.S.C. § 1441(d). Petition at App. 53a.

c. *Patrickson* has no bearing. The Ninth Circuit's opinion stated:

> We have held that, under the FSIA, a corporation owned by an agency or instrumentality of a foreign government is not itself an instrumentality of that government. *Gates*, 54 F.3d at 1462. The Supreme Court has recently granted certiorari on this question. *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *cert. granted in part*, 536 U.S. 956, 122 S. Ct. 2657, 153 L. Ed. 2d 834 (2002). . . . The pendency of *Patrickson* in the Supreme Court does not affect our decision here, however, because ***we rest our decision on a separate ground.***

322 F.3d at 639 n.3 (emphasis added).

Later, in connection with EIEG's petition for rehearing before the Ninth Circuit, the parties briefed whether the *Patrickson* opinion applied. EIEG was fully heard on this issue. The Ninth Circuit allowed EIEG to file a 10 page reply (filed April 28, 2003), discussing *Patrickson*. Thereafter, on May 29, 2003, the Ninth Circuit denied EIEG's petition for rehearing.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE THIS CASE IS STILL INTERLOCUTORY

This case is not appropriate for certiorari because it is interlocutory. The Ninth Circuit appeals arose from the district court's orders reforming a Term Sheet for Settlement, including giving EIEG six additional months to pay the RCC $55 million, and ordering a return to trial if EIEG did not perform by the reformed deadline. The Ninth Circuit affirmed the district court's exercise of jurisdiction, reversed the district court orders regarding the Term Sheet, and remanded the action to district court for trial. Thus, although this case has been in litigation for a long time, in fact, the parties are at the beginning: awaiting trial. This petition is interlocutory, like EIEG's prior petition for certiorari. *See supra* note 3.

There is no warrant for this Court to intervene now in this lawsuit. Normally, this Court will not issue a writ of certiorari until there is a final decree. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Lack of finality in the judgment below is a sufficient basis to deny certiorari. *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328

(1967) (denying certiorari "because the Court of Appeals remanded the case, [and thus] it is not yet ripe for review by this Court"). Indeed, interlocutory orders denying motions to remand are not ordinarily reviewed by either the Courts of Appeals or the Supreme Court until there is a final judgment. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996).

II. NO CIRCUIT CONFLICT EXISTS

Certiorari should be denied because EIEG fails to identify any genuine circuit conflict. None exists.

1. The plain language of 28 U.S.C. § 1603(b)(2) sets forth two independent means by which any entity which is a separate legal person, corporate or otherwise, can be an agency or instrumentality of a foreign state. "[T]he entity must *either* be an 'organ of a foreign state' ***or*** have a majority of its shares owned by 'a foreign state or political subdivision thereof.'" *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1461 (9th Cir. 1995) (emphasis added). Under Section 1603(b)(2), if an entity is "an organ of a foreign state," it is irrelevant whether a majority of its shares are directly owned by the foreign state or whether, as with the RCC in this case, it is a wholly-owned subsidiary of an agency or instrumentality of a foreign state. *Id.*, *see also* H.R. Rep. 94-1487 at 15-16 ("entities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a government procurement agency or a department or ministry which acts and is suable in its own name."). There is no conflict among the circuits on this issue.

a. Every Ninth Circuit opinion that has addressed the issue has agreed that the "organ" test and "ownership" test are two independent ways for an entity to qualify as an "agency or instrumentality" of a foreign state under Section 1603(b)(2). *See, e.g., Patrickson v. Dole Food Co.*, 251 F.3d 795, 807-08 (9th Cir. 2001), *aff'd,* 538 U.S. ____, 155 L. Ed. 2d 643, 123 S. Ct. 1655 (2003) (recognizing that a corporation which is not directly owned by a foreign sovereign may be an organ of a foreign sovereign); *EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.*, 257 F.3d 992, 997 (9th Cir. 2001) (even though a majority of a corporation's shares are not directly held by a foreign sovereign, "it is still possible for it to be an 'organ' of a foreign state as defined by § 1603(b)(2)."); *Corporacion Mexicana de Servicios Maritimos, SA de C.V. v. M/T Respect*, 89 F.3d 650, 654 (9th Cir. 1996) ("there are two ways in which an entity can fulfill the requirements of § 1603(b)(2).").

b. The other circuits and their district courts uniformly conclude that an entity need only satisfy ***either*** the "organ" test ***or*** the "ownership" test, not both. *E.g., USX Corp. v. Adriatic Ins. Co.*, 2003 U.S. App. LEXIS 19779 (3d Cir. Sept. 25, 2003) (Post-*Patrickson* decision holding that a corporation satisfied the "organ" test, but not the "ownership" test); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846 (5th Cir. 2000) ("because we conclude that Al Furat is an organ of a foreign state, we need *not* consider § 1603(b)(2)'s ownership requirements"); *Dewhurst v. Telenor Invest A.S.*, 83 F. Supp. 2d 577, 594 (D. Md. 2000) ("Subsection 1603(b)(2) is written in the disjunctive. . . . If the subsidiary is 'an organ of a foreign state or political subdivision thereof,' it can receive the protections of the FSIA, regardless of the owner of the subsidiary's shares."); *Proctor & Gamble Cellulose Co. v.*

Viskoza-Loznica, 33 F. Supp. 2d 644, 654 (W.D. Tenn. 1998) (evaluating both "ownership" and "organ" tests).

c. No court has ever held that a separate legal person, corporate or otherwise, which is an "organ of a foreign state" within the meaning of the FSIA, must also have a majority of its shares or other ownership interest directly owned by the foreign state to be an "agency or instrumentality of a foreign state." No court could so hold. It is contrary to the plain language of 28 U.S.C. § 1603(b)(2).

d. Before addressing the "organ" prong, this Court should wait to see whether a post-*Patrickson* circuit conflict on the "organ" prong ever materializes. There is none now.

2. On the second question, certiorari is also unnecessary. No circuit conflict exists regarding whether a foreign sovereign may remove an action when it is joined as a defendant pursuant to stipulation and order. This issue is extremely rare. The Ninth Circuit's decision is the first to address the issue since the FSIA was passed in 1976. No other circuit "has answered this precise question." 322 F.3d at 645 n.7.

III. THE NINTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

The Supreme Court has not addressed either of the two issues presented in the petition. No conflict with this Court's decisions thus could exist.

1. On the first issue, this Court has never addressed the "organ" test in Section 1603(b)(2). Accordingly, the

Ninth Circuit's decision does not conflict with any decision of this Court.

a. The Ninth Circuit held "there are two ways in which an entity can fulfill the requirements of [28 U.S.C. § 1603(b)(2)]. *Either* the entity can be an 'organ of a foreign state,' *or* the entity can have a majority of its shares . . . owned by 'a foreign state or a political subdivision thereof.'" 322 F.3d at 639 (emphasis in original).

b. EIEG's petition rises and falls on its interpretation of *Patrickson*, a case that did not involve or address the "organ" test. *Patrickson* addressed ***only*** the "ownership" test in 28 U.S.C. § 1603(b)(2) and did not consider the separate "organ" test in that section:

> [The Dead Seas Companies] cannot come within the statutory language which grants status as an instrumentality of a foreign state to an entity a 'majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.' § 1603(b)(2). We hold that only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement.

123 S. Ct. at 1660.

c. EIEG cites *Patrickson* for the proposition that a corporate entity can only qualify as an agency or instrumentality of a foreign state if a majority of its shares are directly owned by a foreign state. But *Patrickson* did not so hold. Nowhere in *Patrickson* did this Court suggest that a corporation which satisfied the "organ" prong within the meaning of the FSIA could not be an agency or instrumentality unless it also satisfied the separate "ownership" prong at issue in *Patrickson*. Indicative of the fact that

Patrickson was not considering the "organ" test in Section 1603(b)(3), the word "organ" appears only once in the entire opinion – in a quotation of the statutory language.

d. The briefs in *Patrickson* establish that the "organ" prong was a separate test and not at issue in *Patrickson.* In *Patrickson,* the Solicitor General set forth the United States' position:

> [A] determination that a foreign state does not own a majority of the shares of a corporate entity does not exclude the possibility that the corporation may nevertheless qualify as an 'organ' of a foreign state.

Brief of the United States, at 12 n.5 (May 31, 2002). The United States reiterated this position in its brief on the merits. "Section 1603(b) similarly confers 'agency or instrumentality' status on corporations engaged in sovereign acts through its provision extending that status to an 'organ of a foreign state.' 28 U.S.C. 1603(b)(2). *In addition*, Section 1603(b) confers that status – and the accompanying procedural protections – on corporations the majority of whose shares are actually owned by a foreign state, *whether or not* those corporations perform sovereign functions. *Ibid.*" 2002 WL 31261045 (Appellate Brief) Brief for the United States As Amicus Curiae Supporting Respondents (October 3, 2002), at 19.

e. Other briefs in *Patrickson* stressed that the "organ" test was not before the Court:

• "There is a separate test that does look to the governmental purpose of the entity in question, the 'organ'

test of § 1603(b)(2), but that test is not at issue in *Patrickson*."[7]

- "If a foreign entity (whether corporate or not) is genuinely involved in sovereign activities, it can seek to satisfy a separate test for FSIA immunity, known as the 'organ' test. Here, the lower courts held that the Dead Sea Companies did not meet that test, and petitioners do not seek review of the question."[8]

In sum, *Patrickson* did not consider the "organ" prong of Section 1603(b)(2) on which the Ninth Circuit relied. The Ninth Circuit's decision here does not conflict with *Patrickson*.

f. EIEG argues, erroneously, that Congress did not intend to include corporations as "organs of a foreign state." Referencing various secondary authorities, EIEG asserts that at the time Congress enacted the FSIA the general understanding within the international law framework was that the term "organ" did not include corporations. No case has so held. The secondary authorities cited by EIEG establish exactly the opposite.

- "The immunity of a foreign state . . . extends to . . . a corporation created under its laws and exercising functions comparable to those of an agency of the state." "A corporation performing a governmental function is possibly entitled to immunity even though the government

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[7] 2002 WL 1987396 (Appellate Brief) Brief Amicus Curiae of the Republic of Ireland and Icarom PLC (Under Administration) in Support of Petitioners (August 23, 2002) at *23, n.13.

[8] 2002 WL 31261029 (Appellate Brief) Brief of Respondents (October 3, 2002) at *10.

owns only a portion of its stock." *Restatement (Second) of Foreign Relations Law of the United States § 66(g) and cmt. c and Reporters' Note 2(b)* (1965).

- The "decisive criterion" for determining whether public corporations are organs of the State "should be the nature of the functions performed. . . . "[9] *Third Report on State Responsibility,* U.N. Doc. A/CN. 4/246 & Add. 1-3, *reprinted in* [1971] 2 Y.B. Int'l. L. Comm'n (pt. 1) 199, U.N. Doc. A/CN.4/SER.A/1971 at 256.

- "The terms 'organ' and 'agency' are intended to comprehend all the organs and agencies, in the broadest sense, through which a State may act." *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*, Art. 16.1, *reprinted in* F.V. García-Amador et al., *Recent Codification of the Law of State Responsibility for Injuries to Aliens* 250 (1974).

- Other countries extend sovereign immunity to corporations ***not*** on the basis of ownership but instead on the basis of whether the corporation engages "in the exercise of sovereign authority." Gary B. Born & David Westin, *International Civil Litigation in United States Courts*, 459 (2d ed. 1992).

- Under the separate entity rule, corporations that perform sovereign functions are entitled to sovereign

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[9] "[I]t would be absurd to conclude, on the basis of this distribution [of public functions between the State itself and other public institutions or corporations] that an act or omission in the performance of one and the same public function should, from the international standpoint, be considered as an act of the State in one case and not in another." *Id.* at 256.

immunity. William C. Hoffman, *The Separate Entity Rule in International Perspective*, 65 Tul. L. Rev. 535, 542-43 and 546 (1991).[10]

The international law framework establishes that the term "organ" includes corporations that performed sovereign functions, without regard to their owners.

g. EIEG does not seek review of either the Ninth Circuit's decision that the RCC is an organ of the Japanese government, or the test employed by the Ninth Circuit to evaluate whether an entity is an organ. Despite this, EIEG devotes pages of its petition to calling the "organ" test "complex," a "tortuous multi-factor balancing inquiry," "unworkable," and "convoluted." Petition at 7, 9, 15 and 20-23. It is not. The Ninth Circuit and district court had no difficulty in evaluating various relevant factors, considering substantial evidence, and concluding that the RCC is a government organ.[11] Moreover, the secondary authorities upon which EIEG relies support the use of the "multi-factor" inquiry employed by the Ninth Circuit. Gabe Shawn Varges, *Defining a Sovereign for Immunity*

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[10] This secondary authority cites the pre-FSIA case of *Dunlap v. Banco Central del Ecuador*, 41 N.Y.S.2d 650 (N.Y. Sup. Ct. 1943). *Id.* at 542, n.41. In that case, the court denied a motion to dismiss the sovereign immunity defense asserted by the defendant, which was a corporation 45% owned by Ecuador because "it may have acted solely as a part of the Republic of Ecuador, and as its instrumentality in the performance of its governmental function of minting and circulating its fractional money." *Id.* at 652.

[11] EIEG's suggestion that appellate courts will likely reach different conclusions than the district courts in evaluating the relevant factors (Petition at 15) is not supported by the appellate experience. This Court need not grant review now because of EIEG's prediction of as-yet-nonexistent trial court confusion.

Purposes, 26 Harv. Int'l L. J. at 154 (1985); *Restatement (Second) of Foreign Relations § 66* (1965) Reporters' Notes.

2. On the second question presented by EIEG's petition for certiorari, the Ninth Circuit's decision is correct and does not conflict with any decision by this Court. The broad language of 28 U.S.C. § 1441(d) authorizes removal of "*any* civil action brought in a State court against a foreign state." (Emphasis added). This statutory language is unambiguous and contains no indication of any limit on the right to removal when the foreign sovereign is joined as a defendant pursuant to stipulation and court order. Allowing foreign states to remove actions when they are joined as defendants is consistent with Congress' unusually strong preference "that actions involving foreign states be tried in federal courts," H.R. Rep. No. 94-1487, at 32, and the fact that "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts." *Verlinden*, 461 U.S. at 497. Limiting a foreign sovereign's right to remove when joined as a defendant pursuant to stipulation and court order would rewrite the statutory language.

a. "The right to remove a case from a state to a federal court is purely statutory and therefore its scope and the terms of its availability are entirely dependent on the will of Congress." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 3d § 3721 (1998); *Tenn. v. Davis*, 100 U.S. 257, 263-64 (1879); *Martin v. Hunter's Lessee*, 1 Wheat. (14 U.S.) 304, 349 (1816) ("The time, the process, and the manner [of removal], must be subject to [Congress'] absolute legislative control.");

Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 (2002) ("the right of removal is entirely a creature of statute").

b. The "starting point for interpreting a statute is the language of the statute itself." *Hallstrom v. Tillamook County,* 493 U.S. 20, 25 (1989). Congress explicitly drafted the FSIA removal action very broadly. It applies to "any civil action brought in a State court against a foreign state." 28 U.S.C. § 1441(d). As the Ninth Circuit held:

> On its face, §1441(d) contains no restrictions on a foreign sovereign's right to remove. . . . Under a straightforward reading of §1441(d), then, a later-joined foreign sovereign assignee apparently enjoys the same right of removal as a foreign sovereign that is an original defendant in a suit filed in state court.

332 F.3d at 644. When EIEG stipulated to the joinder of the RCC as a defendant, and the Guam Superior Court ordered its joinder, this lawsuit became a "civil action brought in a State court against a foreign state." 28 U.S.C. § 1441(d).[12]

c. This Court has never held that the FSIA precludes a foreign state from removing an action when it joins an action as a defendant pursuant to stipulation. In

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[12] The statute does not require that the foreign state be named as a defendant when a plaintiff originally files its complaint. Circuits have uniformly held that foreign sovereigns may remove actions when they are named as third-party defendants subsequent to the filing of the original complaint. *Davis v. McCourt,* 226 F.3d 506, 509 (6th Cir. 2000); *In re Air Crash Disaster Near Roselawn,* 96 F.3d 932, 942 (7th Cir. 1996); *In re Surinam Airways Holding Co.,* 974 F.2d 1255, 1259 (11th Cir. 1992); *Nolan v. Boeing Co.,* 919 F.2d 1058, 1064-65 (5th Cir. 1990).

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489-90 (1983), this Court instructed that no limitations on the right of a foreign state to be in federal court should be implied in the FSIA. Specifically, this Court indicated that limits on diversity jurisdiction should not be engrafted into the FSIA. Despite the fact that diversity jurisdiction does not exist over actions by foreign plaintiffs against foreign defendants, the language of FSIA provides for subject matter jurisdiction over any "civil action against a foreign state. . . . " 28 U.S.C. § 1330(a). This Court held the FSIA "contains no indication of any limitation based on the citizenship of the plaintiff." *Id.* at 490. Accordingly, this Court held: "[i]f an action satisfies the substantive standards of the Act, it may be brought in federal court regardless of the citizenship of the plaintiff." *Id.* at 490. *Verlinden* teaches that limitations should not be read into the FSIA based on rules applicable to diversity jurisdiction, when the FSIA's statutory language "contains no indication of any limitation." *Id.* at 490.

d. Contrary to EIEG's petition, the Ninth Circuit's decision is not "irreconcilable with *Patrickson*." *Patrickson* is legally and factually distinct. In *Patrickson*, defendants impleaded the putative instrumentality of a foreign state subsequent to the original filing of the complaint. At that time, the foreign sovereign had severed its relationship with the impleaded defendant. In these circumstances, *Patrickson* held that agency or instrumentality status must be determined at the time suit is filed, not at the prior date of alleged wrongdoing. 123 S. Ct. at 1662-63. In so ruling, *Patrickson* relied on the use of the present tense in Section 1603(b) and merely noted, as an aside, that its interpretation of the statutory language in the FSIA was consistent with the rule in diversity cases

that diversity jurisdiction depends on citizenship of the parties at the time suit is filed. 123 S. Ct. at 1662. *Patrickson* did not state that jurisdictional limitations based on diversity rules should be implied wholesale into the FSIA or purport to overrule *Verlinden*.[13]

e. EIEG relies on two diversity cases from the mid-1880s, *Cable v. Ellis*, 110 U.S. 389 (1884) and *Jefferson v. Driver*, 117 U.S. 272 (1886), to argue that a party that "joins a pending state court action cannot remove the case to federal court unless the case could have been removed in that party's absence." Petition at 24. EIEG's argument is divorced from any analysis of the FSIA's broad statutory language authorizing removal of "any civil action brought in State court against a foreign state" and fails to recognize that *Cable* and *Jefferson* pre-date the FSIA.

f. EIEG asserts that "[t]he Ninth Circuit refused to follow *Cable* and *Jefferson* because they are old." Petition at 25. Not so. Rather, the Ninth Circuit correctly noted that "[t]hese cases were decided almost one hundred years ***before*** the enactment of the FSIA and the concomitant creation of removal rights in foreign states. Thus, these cases cannot and do not speak directly to the

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[13] When a foreign sovereign is joined as a defendant subsequent to the filing of the original complaint, the suit becomes a "civil action brought in State court against a foreign state" as of the date of joinder. *Cf., Davis*, 226 F.3d at 509; *In re Air Crash Disaster*, 96 F.3d at 942; *In re Surinam Airways*, 974 F.2d at 1259; *Nolan*, 919 F.2d at 1064-65. The use of the present tense in 28 U.S.C. § 1603(b)(2) and *Patrickson* indicate that in such a case the instrumentality status of the entity must be determined as of the date of joinder, not as of some earlier date when the entity was not a defendant.

question of what Congress intended the FSIA rule to be." 322 F.3d at 646-47 (emphasis added). Neither *Cable* nor *Jefferson* purported to interpret the FSIA's removal provisions or limit Congress' ability to authorize removal.

g. The FSIA's legislative history also supports the Ninth Circuit's refusal to apply *Cable* and *Jefferson* to FSIA removal. The FSIA establishes comprehensive statutory standards for actions against foreign sovereigns. H.R. Rep. No. 94-1487, at 12. The FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States." *Id.* The FSIA "preempt[s] any other State or Federal Law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities." *Id.* To engraft limitations on diversity removal into FSIA removal, as EIEG suggests, would be directly contrary to the statute.

h. Applying *Cable* and *Jefferson* to FSIA removal would also be contrary to "Congress' unusually strong preference for adjudication of claims against foreign states in the federal court system." *In re Texas E. Transmission Corp.*, 15 F.3d 1230, 1243 (3rd Cir. 1994); H.R. Rep. No. 94-1487, at 32 ("In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in State courts."). This Court recognized this unusually strong preference: "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a

multiplicity of conflicting results among the courts of the 50 States." *Verlinden*, 461 U.S. at 497.[14] Nothing in the FSIA suggests that Congress was less concerned about actions against foreign sovereigns when they were joined as defendants pursuant to stipulation and order.

i. The Congressional policies underlying the broad statutory language in the FSIA providing for removal of "any civil action . . . against a foreign state" apply equally when claims are asserted against a foreign state as the result of its joinder in an action pursuant to stipulation. The Ninth Circuit correctly recognized this: "Logically, Congress' twin concerns – the potential political sensitivity of actions against foreign states and the importance of developing a uniform body of federal law in this area – apply equally to a foreign state that is a 'voluntary' defendant and to a foreign state that is an 'involuntary' defendant. If the foreign sovereign's interests are at play, the 'voluntary' nature of the sovereign's participation does nothing to diminish Congress' concerns about the need for sensitivity to foreign states and the need for uniformity of law in this area." 322 F.3d at 646.

j. EIEG argues that FSIA must be read in light of the "general rules" governing removal and that to the extent Congress intended the FSIA to deviate from the

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[14] EIEG incorrectly argues that "the FSIA is inapplicable" "[w]hen foreign states are plaintiffs." Petition at 28. In fact, the FSIA added diversity jurisdiction for foreign sovereign plaintiffs. 28 U.S.C. § 1332(a)(4). This section reflects that foreign sovereigns are entitled to special access to a federal forum, even when they voluntarily participate in litigation in the United States. H.R. Rep. No. 94-1487, at 14 ("to provide for diversity jurisdiction in actions brought by a foreign state as plaintiff").

general rules governing removal, it expressly codified those deviations. Petition at 27. Again, not true. For example, unlike diversity where there is an amount-in-controversy threshold (now $75,000), there is no such amount-in-controversy requirement in the FSIA. As another example, the general rule is that all defendants must join in removal, and that a case is not removable if one of the defendants is a resident of the forum state. In FSIA cases, however, "[n]ew subsection (d) of section 1441 permits the removal of any such action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought." H.R. Rep. No. 94-1487, at 32. Contrary to EIEG's argument, the language of Section 1441(d) does ***not*** "codif[y] those deviations from the general rules in the text of the statute." *Cf.* Petition at 27.

k. The Ninth Circuit correctly recognized that the broad removal provision in Section 1441(d) should be construed in a way consistent with the removal statutes for the Resolution Trust Corporation (RTC) and Federal Deposit Insurance Corporation (FDIC), two U.S. government instrumentalities analogous to the RCC. 322 F.3d at 648-49. Congress has authorized the RTC and FDIC to remove "any action, suit or proceeding" to which these entities become parties. 12 U.S.C. §§ 1441a(l)(3)(A) and 1819(b)(2)(B). The circuits have uniformly held that the RTC and FDIC may remove "any action" to federal court, without any discussion in the cases as to whether the RTC or FDIC's joinder was voluntary or involuntary. *E.g.*, *RTC v. BVS Dev., Inc.*, 42 F.3d 1206, 1211-12 (9th Cir. 1994); *FDIC v. Keating*, 12 F.3d 314 (1st Cir. 1993); *RTC v. Nernberg*, 3 F.3d 62 (3d Cir. 1993); *In re 5300 Mem'l*

Investors, Ltd., 973 F.2d 1160, 1162 (5th Cir. 1992); *In re Meyerland Co.*, 960 F.2d 512 (5th Cir. 1992). Just as *Cable* and *Jefferson* do not limit the RTC's and FDIC's right to remove "any action" when it voluntarily substitutes in an action, they likewise do not limit a foreign sovereign's right to remove "[a]ny civil action brought in a state court against a foreign state," without regard to whether the foreign sovereign becomes a defendant pursuant to stipulation.[15]

Given the similar statutory language authorizing removal, there is nothing extraordinary about the RCC being able to remove actions in circumstances similar to those under which the RTC or FDIC can remove actions – *i.e.*, when RCC becomes a defendant to an action after acquiring assets from a failed financial institution as part of government efforts to revitalize a country's financial system.

1. Removal by foreign sovereigns who join actions poses no serious threat of mischief as EIEG asserts. EIEG speculates that the Ninth Circuit's decision will cause forum shopping and manipulation of federal jurisdiction by private parties acting in collusion with foreign sovereigns. Petition at 29-30. The dearth of cases involving removal by foreign sovereigns joined as defendants pursuant to stipulation belies EIEG's speculation. In fact, EIEG never asserted below that the RCC, an agency

[15] EIEG misconstrues *Matthews v. CTI Container Transport International Inc.*, 871 F.2d 270, 281 (2d Cir. 1989), as holding that a foreign sovereign which voluntarily participates in litigation has no FSIA protections. Petition at 29. The Second Circuit, however, emphasized in *Matthews* that the FSIA's protections, including the right to a non-jury trial, still applied. 871 F.2d at 281 n.6.

and instrumentality of Japan, was collusively joined or manipulated federal jurisdictional facts. In any event, Congress has already addressed the possibility of the manipulation of jurisdiction facts. 28 U.S.C. Section 1359 provides that "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." Section 1359 is designed "to prevent the manipulation of jurisdictional facts" by parties "who by sham, pretense, or other fiction acquire a spurious status that would allow them to invoke the limited jurisdiction of the federal courts." *Nolan v. Boeing Co.*, 919 F.2d 1058, 1067 (5th Cir. 1990). This statute addresses EIEG's concerns. There is no need to create a judicial limitation on the right of foreign sovereign defendants to remove pursuant to 28 U.S.C. Section 1441(d).

IV. THERE IS NO REASON TO GRANT, VACATE, AND REMAND

EIEG asks for a grant, vacate, and remand order. None is necessary, because EIEG already argued to the Ninth Circuit its views about the applicability of *Patrickson*. Although the Ninth Circuit issued its decision before *Patrickson*, the Ninth Circuit correctly recognized what was (the "ownership" prong) and what was not (the "organ" prong) at issue in *Patrickson*: "The pendency of *Patrickson* in the Supreme Court does not affect our decision here, however, because we rest our decision on a separate ground [*i.e.*, the 'organ' prong]." 322 F.3d at 639 n.3.

Then, in connection with EIEG's petition for rehearing, both EIEG and the RCC/Bank substantially briefed

Patrickson in pleadings filed in April 2003. EIEG acknowledges that the Ninth Circuit was aware of this Court's decision in *Patrickson* before denying EIEG's rehearing petition. Petition at 8, 10. The Ninth Circuit denied EIEG's petition for rehearing on May 29, 2003, after allowing EIEG to file a detailed reply in support of the petition for rehearing which addressed the decision.

Because it is clear that the Ninth Circuit considered this Court's decision in *Patrickson* and found it inapplicable to the "organ" prong of Section 1603(b)(2), an order granting certiorari, vacating, and remanding would not be appropriate. *Cf. Lawrence v. Chater*, 516 U.S. 163, 173 (1996) (The Court's power to issue order granting certiorari, vacating, and remanding "should be exercised sparingly").

V. CONCLUSION

For the reasons set forth above, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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